ENFORCEMENT ACTIONS

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Enforcement Actions Update

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Typical Scenario

- EPA and/or State inspect
- NOV or Complaint issues
- Fine proposed (in RCRA up to $27,500 per day per violation)
- Settlement negotiated or case litigated
- Paid from installation O&M account

Civil Liability
Typical Scenario

Civil Liability

Typical Scenario

Litigation Track

Motions and Prehearing Conference

Hearing by Presiding Officer

Proposed Finding and Order

Presiding Officer Decision

Appeals: EAB then EPA Adm'r

Civil Liability

Typical Scenario

Settlement Track

Immediate corrective measures

ELS and reg'or begin negotiations

Regulator drafts CACO; ELS reviews

ELD reviews

IC and State/EPA signs

Air Force Twist

Similar Process (substituting AFLSA/JACE for ELS and ELD, however, the installation, in consultation with the MAJCOM an JACE, is the deciding authority on all settlements.

PENALTY GUIDELINES

Gravity-Based Component

plus

Multi-Day Component

adjusted by

Other Factors

Adjustment Factors

- **Economic benefit of noncompliance**
- **Other factors:**
  - **Good faith**
  - **Degree of willfulness or negligence**
  - **History of noncompliance**
  - **Ability to pay**
  - **Other unique factors**
- **Supplemental Environmental Projects (SEPs)**

Current Issues

- ***Section 8149, DOD Authorization Bill FY 2000***
- ***Underground Storage Tank Update.***
- ***Economic Benefit Penalties.***

Section 8149, DOD Authorization Bill, FY 2000

- **Authorization Bill signed 26 Oct 99. Prohibits the payment of any Fine or Supplemental Environmental Project without approval of Congress.**
- **During signing ceremony President stated that the DOD will send all fines to Congress for approval.**
- **DOD issues guidance 23 Nov 99.**

Section 8149, DOD Authorization Bill, FY 2000

- **DOD Guidance:**
- **Negotiate with regulator in good faith**
- **Final Consent agreements must include a clause stating that it is subject to Cong. Approval**
- **Legislative Proposals must be to DOD within two weeks of signing**

Section 8149, DOD Authorization Bill, FY 2000

- **Army Supplemental Guidance issued 3 Dec 99. Contains sample consent agreement language.**
- **Navy Guidance issued 8 Dec 99. Contains sample consent agreement language.**
- **No Specific Air Force Guidance**

Section 8149, DOD Authorization Bill, FY 2000

- **Issues:**
- **SEPs negotiated in prior years needing FY 2000 money.**
- **5 Army cases**
- **Requests for funding are in to DOD. Awaiting dispatch to Congress.**

Section 8149, DOD Authorization Bill, FY 2000

- **Issues (cont.):**
- **Future of Section 8149.**
- **Potential dollar limit in future versions?**
- **Potential limit only on EPA fines? (Not likely)**

UST Update

- **DOD disputes authority of EPA (another federal agency) to impose fines for UST violations.**
- **DOD position is that there has been no "clear statement" by Congress that such authority exists.**
- **"Clear statement" standard was articulated by DOJ in opinion regarding CAA fines.**

UST Update

- On 16 April 1999 DOD sent request for opinion to the DOJ Office of Legal Counsel for resolution of the dispute between the two federal agencies.
- After request made to DOJ, 4 DOD UST cases in administrative litigation (2 Army, 1 Navy, 1 AF) were given stays of proceeding awaiting DOJ opinion.
- One AF case decided by EPA ALJ before stay of proceeding was requested.

UST Update

- **Surprisingly ALJ opinion completely supports DOD view on lack of EPA authority to issue fines to another federal agency.**
- **EPA appealed the case to the EAB**
- **Current status: All cases are awaiting the DOJ opinion. Opinion should be published mid-Feb. Guidance: DO NOT PAY UST Fines**

Economic Benefit Penalties

- **Fort Wainwright--Region 10**
- **CAA NOV 31 Dec 99. Max. Daily Penalties Alleged**
- **Earlier Proposed settlement amount: $16.07M**
  - ✔ **Legal Basis**
    - ✔ **Seriousness of violations: $155K**
    - ✔ **Economic benefit: $10.56M**
    - ✔ **Size of the business: $5.35M**
  - ✔

Economic Benefit Penalties

- **Test Case Strategy--**
  - **Settlement offer:**
    - ✔ **99% economic-based**
    - ✔ **No opacity fines**
  - **Army response:**
    - ✔ **Pay gravity fine + SEPs**
    - ✔ **Invited discussion re opacity**
  - **EPA reply:**
    - ✔ **Settlement must included economic piece**

Economic Benefit Penalties

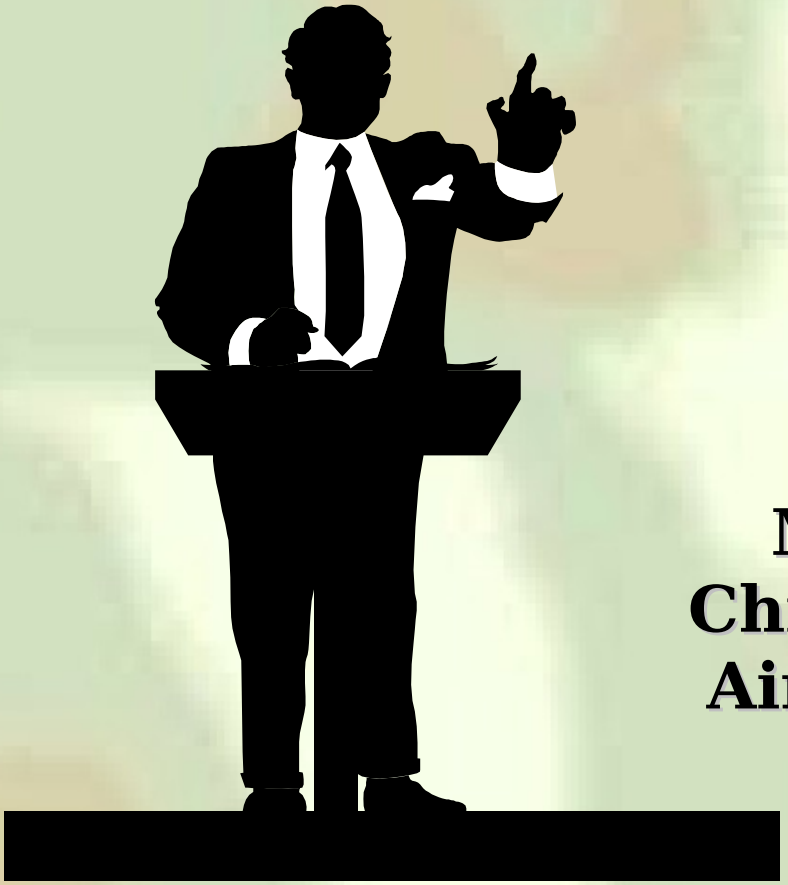
- **Economic Benefit--**
  - **Equitable Purpose:**
    - ✔ **Treat feds "just like" business**
    - ✔ **Recover financial gain**
  - **Assumptions:**
    - ✔ **Commercial competition**
    - ✔ **Delayed costs = saved interest**
    - ✔ **Alternative investments Test Case Strategy--**
-

Economic Benefit Penalties

- **Size of the Business--**
  - **Purpose is Deterrence:**
    - ✔ **Increase reflects ability to pay**
    - ✔ **Necessary to ensure pain**
  - **Assumptions:**
    - ✔ **Assets equated with net worth**
    - ✔ **Can sell or mortgage assets to raise $**

Economic Benefit Penalties

- **Economic-based Fines' Issues:**
  - ➡ **Contrary to law**
    - ✔ **At odds with CAA and its legis. history**
    - ✔ **Problems extend to RCRA and SDWA**
  - **No basis in fact**
    - ✔ **Ignore fundamentals of federal funding**
  - **Effects bad public policy**
    - ✔ **Unduly degrade agency missions**



Lessons Learned

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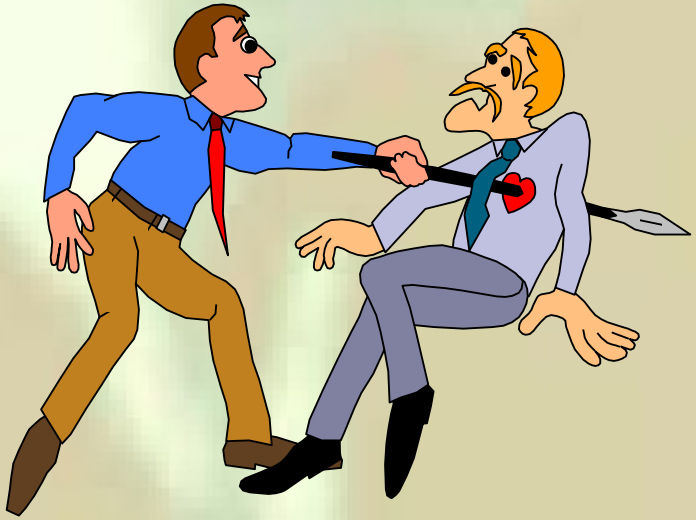
What do we learn from fines, penalties, and NOVs?

Regulators?



Army Environmental Law

Don’t Crash Planes!

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Do not be the victim of a crime!

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Don’t Lie!

DUH!

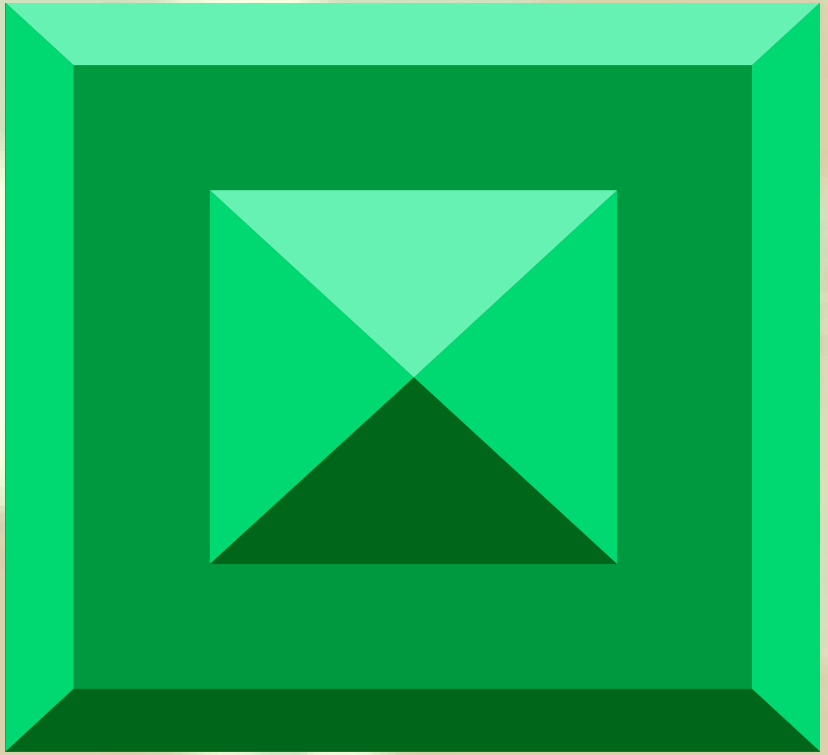
(Technical Legal Term meaning “No Kidding!”)

Army Environmental Law

Show a Sense of Urgency

Turn Square Corners -

especially with hot topics (Asbestos, Paint Booths, New Sources, Manifests, Drinking Water)



Sovereign Immunity is good for a litigation defense. Try not to use it in practice.

Beware who you trust

(Regulators - Contractors)